No. 86-6169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,
Petitioner

v.

THE STATE OF OKLAHOMA,
Respondent

On Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

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BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION

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INTEREST OF THE AMICUS CURIAE AND SUMMARY OF ARGUMENT

The American Bar Association [hereinafter "ABA"] is a voluntary, national membership organization of the legal profession. Its over 329,000 members come from every state and territory and the District of Columbia. The constituency of the ABA includes prosecutors, public defenders, private attorneys, trial and appellate judges at the state and federal levels, legislators, law enforcement and corrections professionals, law school deans, law professors, law students, and a number of non-lawyer associates in allied fields.

Since its inception over one hundred years ago, the ABA has taken an active interest in improving the administration of justice. It has also taken a special interest in the improvement of the juvenile justice system. Toward these ends the ABA has promulgated two comprehensive sets of standards, the ABA *Standards for Criminal Justice* and, in conjunction with the Institute of Judicial Administration (IJA), the IJA/ABA *Juvenile Justice Standards.*

The IJA/ABA Juvenile Justice Standards Drafting Project, which was completed in 1980 with the adoption of the *Juvenile Justice Standards,* involved one of the most thorough studies of our society's response to the problems of juvenile crime ever undertaken. The Standards not only provide a thorough analysis of the historical, legal, and criminological developments in society's effort to respond to juvenile crime, but, because of the diversity of disciplines and perspectives represented by the contributors, the Standards in many ways reflect our society's knowledge, attitudes and values about children who commit crimes. The Project took no position on the death penalty.

In 1983, however, the ABA House of Delegates adopted a resolution opposing, on policy grounds, capital punishment for crimes committed by minors under the age of eighteen years [hereinafter referred to as the "juvenile death penalty"]: "BE IT RESOLVED, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." ABA, *Summary of Actions of the House of Delegates, 1983 Annual Meeting, Reports of Sections* 17. The House of Delegates took no position on the constitutionality of the juvenile death penalty. The adoption of the House resolution followed almost two years of research and consideration of the issue by the ABA Section on Criminal Justice, as summarized in its Report to the House of

Delegates in support of the resolution. ABA, Criminal Justice Section, *Report with Recommendations to the House of Delegates,* Report No. 117A (August 1983) (hereinafter cited "ABA Juvenile Death Penalty Report").

The imposition of the death penalty for crimes committed by minors presents its own special concerns of justice. This claim is underscored by the fact that the ABA had rejected resolutions to limit the use of the death penalty for adults. In 1977, the ABA Section on Individual Rights and Responsibilities proposed a resolution urging the state legislatures to abolish the death penalty in all cases. That resolution failed by a 168-69 vote. ABA *Summary of Actions of the House of Delegates, 1977 Mid-year Meeting, Reports of Sections* 18. In 1979, the ABA Criminal Justice Section proposed a resolution to approve sentencing guidelines limiting the circumstances under which capital punishment could be imposed. That resolution failed in the House of Delegates by voice vote. ABA *Summary of Actions of the House of Delegates, 1979 Annual Meeting, Reports of Sections* 23.

Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence (both positive and negative), and as a result, less responsible and less culpable in a moral sense than adults. *See* IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* 3 (1980). In light of these characteristics, minors are neither entitled to all the rights and privileges of adulthood, nor are they given the full obligations of adulthood until they reach their eighteenth birthdays. *See, e.g.,* U.S. Const. amend. XXVI, § 1.

Because our criminal justice system is based on concepts of individual responsibility, the differences between minors and adults in their capacities to assume such responsibility, recognized in other legal contexts, should be reflected in our response to crimes committed by minors.

The development of the juvenile justice system is the clearest manifestation of society's commitment to this principle of separate treatment of adult and juvenile offenders. Notwithstanding the distinctions in law and fact between minors and adults, the juvenile justice system cannot deal with all juvenile crime. Some minors who commit serious crimes must be subject to trial and sentencing in the criminal justice system in order adequately to protect society and vindicate the criminal laws. However, the fact that a minor is appropriately tried in the criminal justice system does not mean that the ultimate criminal sanction, execution, is appropriate.

The special nature of childhood in our society led to the ABA position against the juvenile death penalty and is directly relevant to the issue before the Court. The death penalty is reserved for people whose crimes are so severe, whose character is so depraved, and whose moral culpability is so great as to warrant the ultimate sanction. *See generally Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg v. Georgia*, 428 U.S. 153 (1976). For the same reason we in other legal contexts conclusively presume that minors are not mature and responsible to the same extent as adults, they should not be held to the degree of moral accountability necessary to justify the ultimate sanction of execution.

ARGUMENT

BECAUSE MINORS ARE NOT CAPABLE OF EXERCISING THE FULL RESPONSIBILITIES OF ADULTHOOD, THEY SHOULD NOT BE HELD TO THE LEVEL OF MORAL ACCOUNTABILITY NECESSARY TO JUSTIFY THE IMPOSITION OF THE PUNISHMENT OF DEATH.

Although the ABA has taken no position on the constitutionality of the juvenile death penalty, the reasons for opposing that sanction as a matter of policy are relevant to this Court's consideration of the constitutional issue. The ABA policy both derives from and reflects the special significance that our society attaches to the status of minority—a special significance that shapes and defines the issue in this case.

As this Court has observed in a number of different contexts, "children have a very special place in life which the law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). In cases which present fundamental questions involving minors—in this case questions of life and death—we cannot ignore the significance of the status of minority. "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." *Id.*

Minors are "most susceptible to influence and psychological damage" and "lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental." *Bellotti v. Baird*, 443 U.S. 602, 635 (1979). They are in the early stages of their emotional growth; their intellectual development is incomplete; they have only limited practical experience; and their value systems are not yet clearly identified and firmly adopted. *Schall v. Martin*, 467 U.S. 253, 265 n.15 (1984) (citing *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 350 N.E.2d 906 (1976)). Unlike adults, minors are always in some

form of custody and subject to the control of their parents or the state as *parens patriae* upon whom the responsibility of making important decisions for the minor traditionally rests. *Schall v. Martin*, 467 U.S. at 265; *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

It is only upon the premise that a minor "is not possessed of that full capacity for individual choice . . . that a state may deprive children of . . . rights—the right to marry, for example or the right to vote—deprivations that would be constitutionally intolerable for adults." *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). The law thus "recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring.)

This recognition is apparent in the development of a separate juvenile justice system for dealing with juvenile crime. Separate treatment of juveniles for their criminal conduct is a relatively recent development. Under common law, children over the age of seven (the age below which a child was considered incapable of possessing criminal intent) were subjected to criminal prosecution and punishment like adult offenders. *In re Gault*, 387 U.S. 1, 16 (1967). However, reaction to the harshness of a system that made no distinction between minor and adult when criminal conduct was involved was widespread and led to the development of separate juvenile justice systems in every jurisdiction in the country. *Id.* at 14-15. The underlying premise of this separate system was that minors are less mature, less able to exercise control and judgment, more easily influenced by others and by their environment and thus less culpable than adults for their actions.

Despite the more recent recognition that the achievements of separating systems of juvenile and criminal justice have fallen short of the goals, *see id.* 387 U.S. at 17-18, our society has not abandoned the underlying

premise that minors who commit crimes should be treated differently from adults. *See, e.g., McKeiver v. Pennsylvania*, 403 U.S. 258 (1973); *Schall v. Martin*, 467 U.S. 253 (1984). Thus, the IJA/ABA *Juvenile Justice Standards*, which provide a candid critique of the juvenile justice system and call for considerable system reform, nevertheless reaffirm the vitality of this underlying principle.[1] *See* IJA/ABA *Standards for Juvenile Justice: Summary and Analysis* 40-41 (1982).

While not addressing the death penalty issue directly, the IJA/ABA *Juvenile Justice Standards* deal specifically with the issue of subjecting some minors who commit crimes to the jurisdiction of the criminal court. Notwithstanding our recognition that minors should not be held to the same standards of criminal responsibility as adults, the protection offered by the juvenile justice system is not appropriate for some minors. IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* 3. Some acts are so offensive to the community that only criminal court jurisdiction can ensure that control is maintained over the juvenile offender for a period proportionate to his offense and prior record. *Id.* However, the existence of a mechanism for transfer of jurisdiction and the acceptance of the necessity of being able to exercise criminal court jurisdiction over children for commis-

[1] There is a tendency to distinguish the juvenile justice system from the criminal justice system by contrasting the "rehabilitative" goals of the former with the "punitive" goals of the latter. However, as this Court has noted, the juvenile justice system has punitive characteristics, *see In re Gault*, 387 U.S. at 27-30; and the criminal justice system is not unconcerned with treatment and rehabilitation. *See Breed v. Jones*, 421 U.S. 519, 530 n.12 (1975). In the ABA's view, whether the guiding principle articulated is treatment, rehabilitation, protection of society through deterrence, or retribution, it is the fact of childhood and the fundamental differences between minors and adults that are the critical factors which ultimately provide the rationale for separate systems. *See IJA/ABA Juvenile Justice Standards Relating to Dispositions, Standard 1.1* and commentary thereto (1980).

sion of serious crimes does not establish the propriety of treating a minor as an adult for the specific and extreme purpose of imposing the death penalty. The transfer decision—whether discretionary with the judge or prosecutor or mandated by the legislature—does not involve a determination that a minor is as mature as an adult and often involves no consideration of individual maturity, especially when the offense is most serious. *See* Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L. Rev. 757, 771-72 (1986); Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology, 1471, 1476-79 (1983). Rather the transfer of jurisdiction is often a pragmatic decision that the limited jurisdiction of the juvenile justice system cannot provide adequate protection for the community.

The factors that warrant transfer and the concomitant decision to subject the minor to the lengthy sentences available in criminal court thus do not resolve the issue of the propriety of the death penalty for the minor who is transferred. It is not at all incongruous to find states in which the juvenile death penalty had been statutorily permissible lowering the minimum age for transfer to adult court as part of "getting tough" on juvenile crime while at the same time eliminating the juvenile death penalty. *See, e.g.*, Tenn. Code Ann. § 37-1-134(1) (1984) (1982 amendments); Or. Rev. Stat. §§ 161.620 (1985), 419.533 (1983) (1985 amendments).

The issue before this Court is whether a minor can, consistent with the Eighth Amendment, be held to that level of responsibility and moral culpability for which society reserves the penalty of death. The words of the Eighth Amendment proscribing imposition of criminal penalties which are cruel and unusual, "are not precise and . . . their scope is not static." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). The meaning of the Amendment is drawn "from the evolving

standards of decency that mark the progress of a maturing society." *Id.* at 101. Thus, punishments which may have been accepted by society when this amendment was adopted can come to be viewed in our time as excessive and unconstitutional. *Gregg v. Georgia*, 428 U.S. at 171 (opinion of Stewart, Powell and Stevens, JJ.).

The death penalty is different in kind from any other criminal punishment; it is "unique in its severity and irrevocability." *Id.* at 187. In light of this, this Court has held that the discretion to impose the death penalty must be limited and directed to ensure that it is not inflicted in an arbitrary and capricious manner. *Zant v. Stephens*, 462 U.S. at 874. Not only must the sentencing authority be provided guidelines, but it must be able to consider any and all mitigating factors, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), including the character and record of the individual and the circumstances of the particular offense, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) and must in fact consider such mitigating factors. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

In certain situations, however, the Court has refused to allow the sentencing authority the discretion to determine whether a defendant should live or die based on a balancing of aggravating and mitigating circumstances presented by the individual case. If the crime is the rape of an adult woman and it does not result in the death of the victim, the death penalty is prohibited. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). If the crime results in the death of the victim, but the person charged is guilty of felony murder *simpliciter*, the death penalty is prohibited. *Enmund v. Florida*, 458 U.S. 782, 788 (1982). For felony murders, the standard appears to be that the death penalty may be imposed if the defendant is a major participant in the felony committed who acted intentionally or with reckless in-

difference to human life. *Tison v. Arizona*, 55 U.S.L.W. 4496, 4502 (U.S. April 21, 1987). Thus, there are situations in which ensuring an individualized consideration of the circumstances of the offense simply does not satisfy the Eighth Amendment; this Court has therefore prohibited execution in such cases.

This Court has already recognized that the youth of a defendant is a mitigating factor which is entitled to great weight, *Eddings v. Oklahoma*, 455 U.S. at 116, and that in a young person, "there can be no doubt that evidence of a turbulent family history . . . is particularly relevant." *Id.* at 115. The issue in this case is whether, when the crime is committed by a minor, the fact of minority is of such overriding importance that a bright line must be drawn prohibiting execution.

In determining whether a particular punishment once tolerated can no longer be reconciled with our advancing standards of decency, the Court has looked to various indicia of contemporary values and attitudes. *Coker v. Georgia*, 433 U.S. at 592, 596 n.10. The ABA Juvenile Death Penalty Report considered such indicia of contemporary values and attitudes as international and legislative norms, viewed in light of our treatment of minority in other jural contexts, in concluding that civilized society should no longer allow execution for crimes committed by minors.

The juvenile death penalty is overwhelmingly rejected in the international community. Article (6)(5) of the International Covenant on Civil and Political Rights, ratified by 81 nations of the world (including most of the Western European countries and Canada), and signed by another nine nations (including the United States), prohibits imposition of the death penalty for crimes committed by those under the age of eighteen. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). Article 4(5) of the American Convention on Human Rights, ratified by nineteen American

states and signed by an additional three (including the United States) includes a similar prohibition.[2] OAS T.S. No. 36, OAS, O.R. OEEA/Ser. A/16/1969. While 28 countries have abolished the death penalty altogether, Amnesty International, *United States of America: The Death Penalty* 228 (1987), over forty countries which have retained the death penalty have statutory provisions prohibiting execution of juvenile offenders. Hartman, *"Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. Cinn. L. Rev. 655, 666 n.44 (1983).[3] Out of thousands of executions reported between January 1980 and May 1986, only eight in four countries were for acts committed by those under age eighteen, including three in the United States. Amnesty International, *United States of America: The Death Penalty* 74 (1987).

Legislative trends in the United States also reflect the unacceptability of the juvenile death penalty. While the re-enactment of the death penalty statutes in thirty-five jurisdictions since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), indicates considerable public acceptance of the death penalty, *see Gregg v. Georgia*, 428 U.S. at 179-80 (Stewart, Powell and Stevens, JJ.), it does not indicate an affirmative endorsement of the

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[2] The United States signed the International Covenant on Civil and Political Rights and the American Convention on Human Rights with express limitations. President Carter submitted both to the Senate for ratification, subject to declarations, reservations and understandings regarding all provisions (including those relating to the juvenile death penalty) which were in conflict with existing United States laws. *See* Message to Senate, 14 Weekly Comp. of Pres. Doc. 395, 396 (1978), and accompanying State Department Letters of Submittal, S. Exec. Doc. Nos. C, D, E and F, 95th Cong., 2d Sess., v-xv and xvii-xxiii (1977). The Senate has yet to act on these proposals.

[3] There is some variation in the age chosen by the wide range of countries which prohibit execution of juveniles and some countries use the terms "minors" or "young people" without specifying the age; however, at least 33 choose ages of eighteen or older. *Id.*

juvenile death penalty. This is reflected by the increasing number of states that upon specific consideration of the juvenile death penalty have rejected it. Thus, at present eleven states which permit the death penalty for adults, prohibit executions for crimes committed by minors under age eighteen. Cal. Penal Code § 190.5 (West Supp. 1986); Colo. Rev. Stat. § 16-11-103 (Supp. 1985); Conn. Gen. Stat. Ann. § 53a-46a(g)(1) (West 1985); Ill. Ann. Stat. ch. 38 § 9-1(b) (Smith-Hurd Supp. 1985); Md. Code Ann. art. 27 § 412 (1987); Neb. Rev. Stat. § 28-105.01 (1982); N.J. Stat. Ann. § 2C:11-3F (West 1986) (P.L. 1985, ch. 4780 approved Jan. 17, 1986); N.M. Stat. Ann. § 31-18-14A (1979); Ohio Rev. Code Ann. § 2929.03(E) (Page 1982); Or. Rev. Stat. § 161.620 (1985); Tenn. Code Ann. § 37-1-134(1) (1984). Taking into account the fifteen jurisdictions which have no death penalty,[4] there are twenty-six jurisdictions that prohibit the imposition of the death penalty for crimes the defendant committed while under age eighteen.

Moreover, in three states, including two of those which have executed persons since this Court's decision in *Furman*, the death penalty may not be imposed for crimes committed when the defendant was under age seventeen, Ga. Code Ann. § 17-9-3 (1982); N.H. Rev. Stat. Ann. § 630.5(II)(b)(5) (Supp. 1983); Tex. Penal Code Ann. § 8.07(d) (Vernon Supp. 1985), suggesting agreement in principle with the concept that minority should be a bar to execution.[5] In fact, the elimination of the juvenile death penalty takes on added significance in light of the

[4] Thirteen states and the District of Columbia have abolished the death penalty. Amnesty International, *United States of America: The Death Penalty* 194 (1987). Vermont has not reenacted a death penalty statute since *Furman*, but retains a pre-*Furman* statute (codified at Vt. Stat. Ann. 13 § 2303(c) (Supp. 1986)) that is clearly invalid.

[5] One state bars the death penalty if the minor was under age sixteen when the crime was committed. Nev. Rev. Stat. § 176.025 (1979).

overall tendency toward greater use of the death penalty in these states.

This Court has recognized that deterrence and retribution are legitimate bases for imposing criminal penalties including capital punishment. *Gregg v. Georgia*, 428 U.S. at 183 (1976) (opinion of Stewart, Powell and Stevens, JJ). The ABA Juvenile Death Penalty Report considered the value of deterrence and retribution. It concluded that these justifications ". . . lose much of their persuasiveness when applied to an adolescent's case." ABA Juvenile Death Penalty Report 8-9. Whatever deterrent effect might exist for potential adult offenders, *Gregg v. Georgia*, 428 U.S. at 184-85, numerous commentators have concluded that, in light of the characteristics associated with childhood—impulsiveness, lack of self control, poor judgment, feelings of invincibility—the deterrent value of the juvenile death penalty is likely of little consequence. *See, e.g.*, Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology, 1471, 1511-13 (1983); Note, *The Decency of Capital Punishment for Minors: Contemporary Standard and the Dignity of Juveniles*, 61 Ind. L. J. 757, 788-90 (1986). In any event, it would be difficult to support a claim that the death penalty as a deterrent for juvenile crime, as opposed to life imprisonment, "is an indispensible part of the State's criminal justice system." *Coker v. Georgia*, 437 U.S. at 592 n.4. Whatever deterrent value might exist is insignificant when balanced against the societal values compromised by the juvenile death penalty.

Retribution, defined by this Court as "the expression of society's moral outrage at particularly offensive conduct." *Gregg v. Georgia*, 428 U.S. at 183, is also an unsatisfactory justification for the juvenile death penalty. The moral force of—and thus the legal justification for—taking human life in retribution is dependent on the degree of culpability of the offender, and not just on the

injury to the victim. *See Enmund v. Florida*, 458 U.S. at 800. Because of our societal attitudes and well-founded legal presumptions regarding the status of minority, a minor simply cannot be held to that degree of culpability and accountability.

In his dissent in *In re Gault*, Justice Stewart referred to the effort to treat criminal behavior of minors differently from adults as "the enlightened task of bringing us out of the world of Charles Dickens in meeting our responsibilities to the child in our society." *In re Gault*, 387 U.S. at 78, 79 (Stewart, J., dissenting). He feared that this Court might "invite a long step backwards into the 19th century" and referred specifically to the time that our society did not recognize a distinction between minors and adults in the criminal law and executed a 12-year-old boy. *Id.* The imposition of capital punishment for crimes committed by minors is a vestige of those unenlightened times to which Justice Stewart referred and should be prohibited.

CONCLUSION

The ABA is opposed to the juvenile death penalty and submits this brief as an aid to the Court in its disposition of this case.

Respectfully submitted,

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